

*IMO Thomas Pavlik, Township of Brick*

DOP Docket No. 2004-1382

**(Merit System Board, decided January 7, 2004)**

Thomas Pavlik, a former Laborer with the Township of Brick, represented by Edward C. Bertucio, Jr., Esq., requests that his previously withdrawn appeal be reinstated.

The facts of this case are as follows: The appellant was appointed as a Laborer for the appointing authority effective January 27, 1997. On July 9, 2000, the appellant was arrested and charged with criminal misconduct, possession of a weapon for an unlawful purpose, and three counts of aggravated assault. Specifically, the allegations were that the appellant struck his grandfather in the head with a kitchen chair several times, kicked two Police Officers, and also attempted to bite and throw urine at the Police Officers.<sup>1</sup> Based on these allegations, the appointing authority removed the appellant from his position effective August 30, 2000 on the charge of conduct unbecoming a public employee. Thereafter, in a letter dated September 5, 2000, the appellant timely filed an appeal to the Merit System Board (Board) and the matter was transmitted to the Office of Administrative Law (OAL). On August 20, 2001, the appellant was convicted in Brick Township Municipal Court of three counts of simple assault, two counts of criminal mischief, one count of harassment and one count of unlawful possession of a weapon. The Brick Township Municipal Court also imposed fines, penalties and costs, and sentenced the appellant to consecutive terms of 60 days in jail and one year probation for each of the assault convictions. On November 16, 2001, the appellant was again convicted in the Law Division, Superior Court. However, no jail sentence was imposed and the probation was vacated.<sup>2</sup> Subsequently, on April 19, 2002, while the appellant's administrative case was still pending at OAL, an order of forfeiture of public employment (order of forfeiture) was entered against the appellant by the Brick Township Municipal Court pursuant to *N.J.S.A. 2C:51-2*. In a letter dated July 3, 2002, the appointing authority advised the Administrative Law Judge (ALJ) of the order of forfeiture and of the appellant's appeal of that decision to the Law Division, Superior Court. Based on these circumstances, the appointing authority requested that the scheduled hearings be adjourned and held in abeyance until the forfeiture issue was exhausted with the courts. However, in a letter dated July 15, 2002, the appellant's counsel informed the ALJ that the order of forfeiture was upheld by the Law Division on July 12, 2002, and therefore, the appellant was withdrawing his appeal. The appellant's counsel also added that the

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<sup>1</sup> These allegations are from the complaints/warrants dated July 9, 2000. These complaints/warrants were attached to the appellant's Preliminary Notice of Disciplinary Action.

<sup>2</sup> *State v. Pavlik*, 363 *N.J. Super.* 307 (App. Div. 2003), indicates the appellant's convictions and the corresponding dates.

scheduled hearing dates were dismissed due to the appellant's withdrawal. At its November 20, 2002 meeting, the Board directed that the appellant's appeal be removed from the hearing calendar and that the case be closed.

In the instant matter, the appellant claims that his appeal was withdrawn pending his appeal of the forfeiture matter. In this regard, the appellant asserts that on October 14, 2003, the Appellate Division vacated the order of forfeiture. *See State v. Pavlik*, 363 N.J. Super. 307 (App. Div. 2003). Therefore, the appellant contends, the appeal that had been pending at OAL should be reinstated and he should be granted a hearing.

In response, the appointing authority, represented by Arthur R. Thibault, Esq., argues that no good cause exists to reinstate the appellant's appeal. It contends that the appellant freely elected to withdraw his appeal and that the July 15, 2002 letter makes no mention of it being withdrawn pending an appeal to the Appellate Division.

In reply, the appellant contends that his previous case before the Board was withdrawn due to the fact that the existing order of forfeiture made this appeal moot. Now he argues that the matter is no longer moot and should be heard by the Board. Additionally, the appellant argues that in vacating the order of forfeiture, the Appellate Division found that there was no nexus between the appellant's conduct and his employment. In this regard, the appellant contends that without this nexus, the order of forfeiture could not be supported, and similarly the charge of conduct unbecoming a public employee cannot be supported. In support of his contention, the appellant submits a copy of the Appellate Division published opinion concerning his order of forfeiture. *See State v. Pavlik, supra.*<sup>3</sup> Based on the preceding, the appellant claims that his removal was improper.

In response, the appointing authority argues that the standards are very different for supporting an order of forfeiture as compared to supporting a charge of conduct unbecoming a public employee. Additionally, the appointing authority maintains that the Appellate Division's decision about the order of forfeiture is not applicable to Merit System law and rules concerning conduct unbecoming a public employee. Further, the appointing authority reiterates its previous argument, stating that the appellant has not provided any good cause to reinstate his appeal after a Final Administrative Action was issued by the Board. Finally, it emphasizes its claim that the appellant made a strategic legal decision to withdraw his appeal and that hindsight is not a basis to reinstate his appeal.

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<sup>3</sup> It is noted that while the Appellate Division vacated the order of forfeiture against the appellant, it upheld the appellant's convictions. Additionally, the court noted that the matter of the appellant's removal on the charge of conduct unbecoming a public employee was not before them.

## CONCLUSION

*N.J.A.C.* 1:1-19.2(a) provides that a party may withdraw a request for a hearing by notifying the judge and all parties. Additionally, *N.J.A.C.* 1:1-19.2(b) states that when a party withdraws, the Clerk shall return the matter to the agency which transmitted the case to the Office of Administrative Law for appropriate disposition. Further, *N.J.A.C.* 1:1-19.2(c) provides that after the Clerk has returned the matter, a party shall address to the transmitting agency head any motion to reopen a withdrawn case.

The appellant voluntarily withdrew his appeal in a letter dated July 15, 2002. He explained in this letter that his withdrawal was based on an order of forfeiture being issued against him. The Board acknowledged this withdrawal at its meeting on November 20, 2002. In the instant matter, the appellant claims that because the order of forfeiture issued against him was vacated by the Appellate Division, his appeal before the Board should be reinstated. The Board agrees.

Initially, it is noted that the withdrawal of this appeal was without prejudice. Although the Board's decision does not specifically state this, nor does *N.J.A.C.* 1:1-19.2, that regulation is clearly analogous to the court rule on voluntary dismissals, *R.* 4:37-1(a), which provides: "Unless otherwise stated in the notice or stipulation, the dismissal is without prejudice." Thus, for good cause, such an appeal can be reinstated for purposes of a determination on the merits.

Moreover, it is clear that the appellant relied solely on the order of forfeiture in withdrawing his appeal, and but for the order of forfeiture, the parties would have proceeded to a hearing on the merits. Therefore, the Appellate Division's decision to vacate the order of forfeiture provides the appellant with good cause to have his appeal before the Board reinstated.

However, while the vacating of the order of forfeiture has enabled the appellant to challenge the disciplinary action, there has been a change in circumstances affecting the appointing authority as well. In particular, after his removal, the appellant was convicted of several offenses, and those convictions were affirmed on appeal. In construing the analogous court rule on voluntary dismissals, the courts have allowed reinstating an action only if there is no prejudice to the opposing party. See *Security Nat. Partners v. Mahler*, 336 *N.J. Super.* 101, 104-105 (App. Div. 2000), *cert. denied*, 169 *N.J.* 607 (2001). Therefore, so as not to unduly prejudice the appointing authority, it will be allowed to modify the charges on the Preliminary Notice of Disciplinary Action (PNDA) and Final Notice of Disciplinary Action (FNDA) to include the appellant's criminal convictions. In this regard, only convictions of *criminal offenses* may be added to the PNDA and FNDA. *N.J.A.C.* 4A:2-2.3(a)5. It is further noted that contrary to the appellant's contention, Merit

System employees may be disciplined for inappropriate off-duty conduct.<sup>4</sup> Accordingly, the Board vacates its prior decision and orders that the appellant's appeal be reinstated and the matter transmitted to OAL for a hearing.

## ORDER

Therefore, it is ordered that the Board's prior decision be vacated and the appellant's request to reinstate his appeal of his removal before the Board be granted and the matter be transmitted to the Office of Administrative Law for a hearing as a contested case.

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<sup>4</sup> See *Karins v. City of Atlantic City*, 152 N.J. 532, 554 (1998) (Court upheld suspension for conduct unbecoming a public employee stating that "Whether the offense was committed off-duty or during the working hours was not relevant"); See also, *In the Matter of Yolanda Forbes* (MSB, decided September 29, 1998) (Board upheld the removal of a Hospital Charge Attendant based on, *inter alia*, conduct unbecoming a public employee for making threatening telephone calls to her supervisor's family, while she was off-duty); *In the Matter of Bud Dzamba* (MSB, decided May 18, 1999) (Board upheld removal of a Sanitation Worker on charges of conduct unbecoming a public employee for using angry, abusive and threatening language which was laced with profanity in a telephone conversation with a nurse, while he was off-duty).